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State v. Steward Respondent's Brief Dckt. 44760

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	Nos. 44760, 44761, 44762
)	& 44763
v.)	
)	Twin Falls County Case Nos.
LUKAS WESLEY STEWART,)	CR-2014-7063, 2014-11232,
)	2015-4472, & 2015-5578
Defendant-Appellant.)	
)	RESPONDENT'S BRIEF

Issue

Has Stewart failed to establish that the district court abused its discretion when it revoked his probation and executed his sentences in case numbers 44760, 44761, 44762, and 44763?

Stewart Has Failed To Establish That The District Court Abused Its Sentencing Discretion

In 2014, Stewart pled guilty to conspiracy to commit burglary in case number 44760, and the district court imposed a unified sentence of seven years, with two years fixed, suspended the sentence, and placed Stewart on probation for three years. (R., pp.115-22.) While case number 44760 was pending, Stewart failed to appear for a court hearing and a warrant was issued for his

arrest. (R. pp.84-86.) Stewart was arrested five days later, and was found with marijuana and methamphetamine while at the county jail. (R., pp.284-87.) The state subsequently charged Stewart with possession of a controlled substance and possession of certain articles into correctional facility in case number 44761; pursuant to a plea agreement he pled guilty to possession of a controlled substance and the state agreed to dismiss the other count. (R., pp.317-18, 322.) The district court imposed a unified sentence of one year fixed and one year indeterminate, suspended the sentence, and placed Stewart on probation for three years. (Judgment of Conviction for case 44761 (Augmentation).)

Stewart later admitted to having violated his probation in case numbers 44760 and 44761 by, among other things, being charged with possession of methamphetamine in case number 44762. (R., pp.147-66, 379-98, 402, 515-18, 547-50.) Stewart pled guilty to possessing methamphetamine in case number 44762, and the district court imposed a unified sentence of three years, with one year fixed, to run consecutively to the sentences in case numbers 44760 and 44761. (R., pp.577-82.) The court also revoked Stewart's probation and executed the underlying sentences in case numbers 44760 and 44761. (R., pp.169-74, 405-10.) However, the court retained jurisdiction in all three cases. (R., pp.169-74, 405-10, 577-82.)

On June 29, 2015, Stewart pled guilty to forgery in case 44763, and the district court imposed a unified sentence of three years, with one year fixed, to run concurrently with the sentence in case number 44762 but consecutively to the sentences in case numbers 44760 and 44761, and retained jurisdiction. (R., pp.744-49.) After a period of retained jurisdiction the district court placed suspended the balance of Stewart's sentences and placed him on probation for six years in all four cases. (R., pp.184-89, 420-25, 597-602, 765-70.)

In July of 2016, the state filed motions to revoke probation in all four cases, based upon multiple alleged probation violations. (R., pp.190-215, 426-51, 606-31, 774-99.) Stewart admitted to all but one violation, which the state withdrew. (R., pp.224, 460, 638, 808.) The district revoked probation and executed the underlying sentences in all four cases. (R., pp.252-56, 482-86, 660-64, 830-34.) Stewart filed notices of appeal timely from the orders revoking probation in all cases. (R., pp.258-61, 489-92, 666-69, 836-39.)

Stewart argues that the district court abused its discretion by revoking his probation in light of the fact that the therapeutic community programming was cancelled while he was on his rider, because he has the support of his mother, because he claims that he is now taking his recovery seriously, and because he claims that he took accountability for his actions. (Appellant's brief, pp.4-6.) Stewart has failed to establish an abuse of discretion.

"Probation is a matter left to the sound discretion of the court." I.C. § 19-2601(4). The decision whether to revoke a defendant's probation for a violation is within the discretion of the district court. State v. Garner, 161 Idaho 708, ___, 390 P.3d 434, 436 (2017) (quoting State v. Knutsen, 138 Idaho 918, 923, 71 P.3d 1065, 1070 (Ct. App. 2003)). In determining whether to revoke probation, a court must examine whether the probation is achieving the goal of rehabilitation and is consistent with the protection of society. State v. Cornelison, 154 Idaho 793, 797, 302 P.3d 1066, 1070 (Ct. App. 2013) (citations omitted). A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. Id. at 798, 302 P.3d at 1071 (citing State v. Beckett, 122 Idaho 324, 326, 834 P.2d 326, 328 (Ct. App. 1992)).

Stewart has repeatedly demonstrated he is not an appropriate candidate for probation. Stewart's juvenile record includes 12 adjudications within a three year period (2010-2013) in

Arizona, including two counts of residential burglary 2nd degree, two counts of drug paraphernalia, narcotic drug possession, theft less than \$1,000, trafficking stolen property, criminal impersonation, shoplifting less than \$1,000, criminal damage less than \$250, drugs on/near school grounds, and marijuana possession. (PSI, pp.6-7.) Stewart was convicted of petit theft in 2014, and he committed the four felony crimes of which he was convicted in this case between May of 2014 and April of 2015. (PSI, p.6; R., pp.76-78, 317-19, 547-49, 727-29.)

Stewart has been given multiple opportunities to succeed on probation, but he repeatedly violated the conditions of his probation, including by committing and being convicted of new felony crimes. (R., pp.115-21, 350-55, 577-82, 744-49; Judgment of Conviction for case 44761 (Augmentation).) Stewart has also demonstrated that participating in rehabilitative programming offered during a period of retained jurisdiction did not deter his criminal thinking, as he continued to violate the conditions of his probation by failing to report to the department of correction, leaving the state, using methamphetamine three times and marijuana once between March and July of 2016, failing to drug test 12 times, absconding supervision, and failing to pay cost of supervision, court costs, fines, and fees. (R., pp.190-93, 426-29, 606-09, 774-77.)

Stewart's claim that the therapeutic community program was cancelled while he was participating in his rider is true; however, Stewart was able to participate in that program for four weeks, and then was moved to the extended rider program where he completed cognitive self-change, relapse prevention group, anger management, and pre-release. (PSI, pp.52-57.) The programming Stewart received while on his rider was apparently helpful as Stewart himself reported, "I believe I was successful on this rider because I have been able to realize how my thoughts lead to behaviors and begin to make the first steps to change how I think and perceive in order to change the outcomes to more desirable choices that lead me from criminal and

addictive thinking and let me think more as a normal healthy member of society.” (PSI, p.54.) Now incarcerated, Stewart claims to want to take his recovery seriously, but he apparently did not want to take it seriously while on probation both before and after his rider. That Stewart has the support of his mother and claims to have taken accountability for his actions has also not had any ameliorating effect on Stewart’s continued criminal thinking and behavior.

At the disposition hearing for Stewart’s probation violations, the district court set forth its reasons for revoking Stewart’s probation. (11/15/16 Tr., p.8, L.3 – p.9, L.16.) The district court concluded, “These probation violations are clearly willful. I think you certainly do have a lot of problems. But I do not believe that continued probation in this community or a second rider is going to solve the problems.” (11/15/16 Tr., p.9, Ls.4-7.) The state submits that Stewart has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the disposition hearing transcript, which the state adopts as its argument on appeal. (Appendix A)

Conclusion

The state respectfully requests this Court to affirm the district court’s orders revoking probation in all cases.

DATED this 1st day of September, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of September, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

REED P. ANDERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

<p>1 to get the treatment that he needs up there.</p> <p>2 He does have a lot of support here. His mom has</p> <p>3 been supporting him and trying to help him, recognizing that he</p> <p>4 has screwed up on probation, but still, she wants him to get</p> <p>5 the treatment, and that's what he wants as well is he wants to</p> <p>6 get treatment to be able to improve and to, well, frankly, not</p> <p>7 be in the penitentiary for a significant period of time,</p> <p>8 potentially, here. We recognize that he didn't do very well on</p> <p>9 probation, but we'd ask for that additional chance.</p> <p>10 Thank you, Your Honor.</p> <p>11 THE COURT: Mr. Stewart, anything you want to say</p> <p>12 today? You're not required to. You're certainly welcome to if</p> <p>13 you wish.</p> <p>14 THE DEFENDANT: Your Honor, I'd like to take full</p> <p>15 responsibility for my actions. I know that you hear that a</p> <p>16 lot. I know that I'm here before you for a discipline matter,</p> <p>17 and you know, whatever that discipline is, I'm going to take it</p> <p>18 and accept it and learn from it. I would like to have another</p> <p>19 chance to learn, like Mr. Alan was saying, to get a chance to</p> <p>20 program, a real program; TC was taken away while I was there.</p> <p>21 If you remember, you asked me when we came back, and I let you</p> <p>22 know, I informed you that there wasn't any programming. So I</p> <p>23 would just like an opportunity to learn from my mistakes, come</p> <p>24 back from that, and to actually benefit the community which I</p> <p>25 live in instead of take away from it.</p> <p style="text-align: center;">7</p> <p style="text-align: center;">TRACY E. BARKSDALE, RPR, CSR 999</p> <p style="text-align: center;">(208) 736-4039</p>	<p>1 Thank you, Your Honor.</p> <p>2 THE COURT: Okay. Thank you.</p> <p>3 Mr. Stewart, there is no question that your record</p> <p>4 speaks for itself and that probation has certainly not been</p> <p>5 appropriately addressed by you. You know that.</p> <p>6 I see a constant theme in your situation. Count 4</p> <p>7 of this probation violation was failing to drug test. Those</p> <p>8 are intentional decisions. Those aren't programming issues.</p> <p>9 When you're told to do something, you do it, and if you don't</p> <p>10 do that, then that puts you in violation of probation.</p> <p>11 I appreciate the comments with regard to the TC. I</p> <p>12 understand that they had some issues up there for a while.</p> <p>13 That's probably why the department of corrections says, "Go to</p> <p>14 the relapse prevention." Guess what? You quit attending.</p> <p>15 That's not a programming issue, that's a choice issue. You</p> <p>16 have -- you've committed, frankly, three new felonies since I</p> <p>17 put you back on probation. You say, wait a minute, no I</p> <p>18 haven't. Yes, you have. Every time you use methamphetamine,</p> <p>19 you possess it. That wasn't just once, it was March, April,</p> <p>20 June, and another drug use in July.</p> <p>21 You absconded probation in a sense because you left</p> <p>22 the state of Idaho without permission, got yourself involved in</p> <p>23 a car wreck down there. I don't particularly -- I'm not</p> <p>24 concerned about that, that's a different issue, but leaving the</p> <p>25 state of Idaho is certainly a huge issue. That is an</p> <p style="text-align: center;">8</p> <p style="text-align: center;">TRACY E. BARKSDALE, RPR, CSR 999</p> <p style="text-align: center;">(208) 736-4039</p>
<p>1 intentional choice.</p> <p>2 So frankly, I'm just not buying the argument that</p> <p>3 you didn't get the appropriate programming. If you didn't,</p> <p>4 then so be it. These probation violations are clearly willful.</p> <p>5 I think you certainly do have a lot of problems. But I do not</p> <p>6 believe that continued probation in this community or a second</p> <p>7 rider is going to solve the problem. That is why I'm going to</p> <p>8 revoke your probation, impose the suspended sentences. You</p> <p>9 will get the treatment at this time at the penitentiary if you</p> <p>10 want it. If you don't want it, it's not going to do you any</p> <p>11 good.</p> <p>12 I'm aware I have the right and authority to alter</p> <p>13 these sentences. I'm not going to do that. You knew the</p> <p>14 consequences of violation of probation. Number of cases just</p> <p>15 tells me that you're just not ready to live in this community,</p> <p>16 and so that's what we're going to do.</p> <p>17 You have a right of appeal that you have not waived.</p> <p>18 You must perfect this appeal within 42 days of today. Let</p> <p>19 Mr. Boehme know that, and he will file that, and let the</p> <p>20 appellate courts make their decision.</p> <p>21 Remand your custody to the sheriff.</p> <p>22 I suspect you have no idea for time for credit</p> <p>23 served. It's a bunch.</p> <p>24 THE DEFENDANT: I have --</p> <p>25 THE COURT: You think you know, Mr. Stewart?</p> <p style="text-align: center;">9</p> <p style="text-align: center;">TRACY E. BARKSDALE, RPR, CSR 999</p> <p style="text-align: center;">(208) 736-4039</p>	<p>1 THE DEFENDANT: Yes. I have about 29 months left</p> <p>2 above my head.</p> <p>3 THE COURT: Okay.</p> <p>4 THE DEFENDANT: And that's how I calculated it. I'm</p> <p>5 not correct, it could be, it depends on how they calculate my</p> <p>6 rider. Could be 11 months, could be 29 months.</p> <p>7 THE COURT: Obviously, you're entitled to credit for</p> <p>8 time served. There's no question about that. If you have a</p> <p>9 disagreement with the department of corrections, because</p> <p>10 they'll review that with you, let Mr. Boehme know, and we'll</p> <p>11 get that straightened out. I'd like to put that in the order,</p> <p>12 but I don't think I can do that at this time.</p> <p>13 Remand your custody to the sheriff at this time.</p> <p>14 (End of proceedings at 2:03 p.m.)</p> <p>15 -ooo-</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">10</p> <p style="text-align: center;">TRACY E. BARKSDALE, RPR, CSR 999</p> <p style="text-align: center;">(208) 736-4039</p>